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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 516

IRWIN IRA MESSINGER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Irwin Ira Messinger prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 23, 1969.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not reported. It is printed in the Appendix, *infra* (1a-11a).* The opinion of the United States District Court for the Eastern District of New York is not reported and is also printed in the Appendix, *infra* (12a-46a). For the convenience of the Court, both the Hearing Officer's Report (51a-52a) and the Recommendation of the Department of Justice (47a-50a) are printed in the Appendix, *infra.*

* Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to this Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Was Messinger denied a fair and meaningful hearing by the Department of Justice when it capriciously reversed the finding of its hearing officer?

2. Was Messinger denied a fair hearing by the Appeal Board in view of the misstatement of law by the Department of Justice in its recommendation and its failure to supply the Appeal Board with the hearing officer's report?

3. Was Messinger denied due process at the trial where the District Judge assumed an advocate's role and, himself, supplied the "bases in fact" for the Appeal Board classification?

Statement of the Case

Irwin Ira Messinger was convicted and sentenced to three years in prison after trial before Hon. George Rosling, United States District Judge for the Eastern District of New York, sitting without a jury, for violating Section 12 (a) of the Military Selective Service Act of 1967, 50 U.S.C. App. §462(a), by refusing to submit to induction into the armed forces. Messinger's refusal was based upon his claim of exemption from military service as a conscientious objector.

The indictment was filed on September 19, 1968, and trial was held on October 18, 22, 23, and 25, and November 4, 1968. The opinion and findings of fact were filed on January 30, 1969, and Messinger was sentenced on February 3, 1969. Execution of the sentence was stayed pending appeal. On July 23, 1969 the United States Court of Appeals for the Second Circuit affirmed the conviction. The mandate has been stayed pending the action of the Supreme Court on this petition.

Messinger was born in 1945, and registered with the Selective Service System at age eighteen in 1963 (Gov. Ex. 2).* Messinger was first classified by Local Board No. 3, Great Neck, New York (the "local board") on February 19, 1964, and, during the next two years, he was variously classified as available for military service (1-A) and deferred as a student (2-S) until October, 1966, when his request for continued student deferment was rejected by the Presidential Appeal Board (Gov. Ex. 2).

Previously, during August, 1966, when Messinger was twenty-one years of age, he requested from and then filed with his local board Selective Service Form 150 entitled "Special Form for Conscientious Objector" (Gov. Ex. 2).

Messenger appeared before his local board and on January 10, 1967, the local board again classified him 1-A, denying his request for classification as a conscientious

* Messinger's Selective Service file was marked Government's Exhibit "1". All other government exhibits were documents contained in Exhibit "1" and were designated 2-Ex.-1 through 28-Ex.-1. Defendant's exhibits were marked with letters "A" through "E." References to exhibits are indicated by a single number or letter as "Gov. Ex. 2," "Gov. Ex. 20," "Def. Ex. C." References to trial testimony are indicated by the name of the witness and pages in the transcript.

objector (Gov. Ex. 2). Messinger appealed to the Appeal Board for the Eastern District of New York (the "appeal board"), which determined, after preliminary review, that Messinger was not eligible for classification as a conscientious objector (Gov. Ex. 2). On March 29, 1967 pursuant to then applicable procedures,* Messinger's Selective Service file was forwarded to the Department of Justice to secure its advisory recommendation (Gov. Ex. 2).

The Federal Bureau of Investigation (the "FBI") conducted an investigation of Messinger and a report of that investigation was submitted to the Department of Justice. On August 3, 1967, the Department of Justice forwarded a copy of the FBI report, two copies of a "Resume of the Inquiry" of the FBI prepared by the Department of Justice (Gov. Ex. 17) together with Messinger's Selective Service file to Mr. John Clark Toaz, appointed as Special Hearing Officer by the Department of Justice, and instructed Mr. Toaz to conduct a hearing with respect to Messinger's character and good faith (Def. Ex. D). The Department of Justice instructed Mr. Toaz to supply Messinger only with a copy of the resume prior to the hearing. On August 14, 1967, Mr. Toaz gave Messinger notice of the hearing and supplied him with a copy of the resume (Def. Ex. C).

On August 29, 1967, Mr. Toaz conducted a full two and one-half to three hour hearing in which he had an opportunity to review Messinger's entire file and background,

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* The then applicable provisions were found in Selective Service Act of 1948, ch. 625, §6(j), 62 Stat. 604, 612-13, as amended by the 1951 Amendments to the Universal Military Training and Service Act, ch. 144, §1(q), 65 Stat. 75, 86, codified at 50 U.S.C. App. §456(j) (1964). The regulations relating to this procedure were codified at 32 C.F.R. §§1626.25-27 (1949, 1957, 1963).

including the FBI report and "Resume" (Gov. Ex. 17), both with Messenger and with his father, who attended the hearing (Toaz, 293-296).

Mr. Toaz concluded that Messinger was sincere, was making his claim in good faith and recommended that his claim for exemption upon grounds of conscientious objection be sustained. Mr. Toaz' conclusions and recommendations were incorporated in a report dated September 6, 1967 (Def. Ex. C) (51a-52a) which he forwarded to Mr. T. Oscar Smith, Chief of the Conscientious Objector Section of the Department of Justice.

On January 5, 1968, Smith wrote to the appeal board incorrectly advising them on the law, and stating the recommendation of the Department of Justice that Messinger *not* be classified as a conscientious objector (Gov. Ex. 18) (47a-50a). Smith returned to the appeal board the Selective Service file and the resume of the FBI report which he claimed had been the basis for the Department of Justice recommendation. Mr. Smith did not supply to the appeal board either the complete FBI report or Mr. Toaz' report of the hearing held containing Mr. Toaz' conclusions and recommendations.

On February 1, 1968, the appeal board unanimously classified Messinger 1-A, expressing no basis for its determination (Gov. Ex. 22).

Pursuant to an order to report for induction dated February 14, 1968, Messinger appeared on March 20, 1968, but refused induction into the armed forces (Gov. Ex. 2).

At trial, the court continuously biased the proceedings with a curious view of conscientious objection, war, courts,

and the duties of a citizen (Tr., 7-8, 16-18, 106, 109, 204, 205-206, 215-216, 220-221, 368, 387-388).

Knowing the issue before it to be a narrow one (Tr., 18-19), and not wishing to be reversed (Tr., 13), took great pains to create, document and establish what *it* believed was a basis in fact in order to justify *its* judgment of conviction by developing two obscure writings found in Messinger's file.

The two items upon which the trial court seized and underscored throughout its opinion involve the use by Messinger of two words, "trouble" and "service" (17a, 22a, 23a, 26a, 27a, 29a).

The local board, in its "Summary Of Personal Appearance Before Local Board" (Gov. Ex. 15), reported Messinger to have responded that "it was too much trouble" for him to file as a conscientious objector when he submitted his original classification questionaire. At the trial, Messinger specifically denied so responding (Messinger, 327-328, 331-332). Not satisfied with this testimony, interrupting the direct examination of Messinger by his own counsel, the Court cross-examined Messinger, posing a series of objectionable hypothetical questions (Tr., 332-333), continuing until it elicited a hypothetical answer from Messinger which indicated a possible *other* use of the word "trouble."

At the next trial session, after rereading all the exhibits at home (Tr., 350-351), the trial court completed its careful cross-examination and, for the first time, confronted Messinger with the use by him of the word "trouble" in a letter submitted to his local board in November, 1966 (Gov. Ex. 12) (Tr., 392-399). This handwritten letter, re-

produced in full in the court's opinion (23a-24a), never discussed previously by the local board, the FBI, the Hearing Officer, T. Oscar Smith, or even the Assistant United States Attorney, convinced the court that defendant's entire file was a "calculating contrivance of an individual mouthing ethical phrases while, in truth, cooly scheming for personal advantage" (23a).

Re-entering the lists, the trial court interrupted the thread of the government's examination and attacked Messinger's use of the word "service." This semantic dialogue again involved an improper hypothetical interrogation of the defendant (Messinger, 432-436). The conclusion of this linguistic exercise was the hypothetical concession by Messinger, against no background, that his use of the word "service" without any adjective would mean military service.

After a brief pause, and again out of context, the trial court confronted Messinger with a document (Messinger, 438-439) in which Messinger, in December, 1965, made use of the word "service."

Thus, the use of the word "service" by Messinger, like the use of the word "trouble" convinced the trial court that the defendant was an individual "cooly scheming for personal advantage" (23a).

The trial court made certain that the lesson did not go unlearned by the Assistant United States Attorney when, at the close of the defendant's case, a discussion was held as to proposed *rebuttal* testimony by the members of the appeal board. The court said to counsel:

> "Let me say too that I will not deny them [the appeal board members] an opportunity to refresh

their recollection. This case is meaningless, this is just a case that they had, one of I don't know how many, *but there may be something special here.*" (Italics added.)

"Mr. Rosen: Possibly.

"The Court: Yes, *which will decide their thinking* and it may well be that as a practical proposition they just disregarded the raw report of the FBI" (Tr., 490). **(Italics added.)**

The message was clear to the Assistant United States Attorney. When two of the three appeal board members testified, while they were able to state that they had no specific recollection of the case, they were able to testify that these two words "trouble" and "service" were principal factors in their determination, although the issues are nowhere raised in the FBI report or the Justice Department's recommendation and are totally obscured in the file.

Reasons for Granting the Writ

1. The Department of Justice Actions

This Court has carefully considered the due process requirements incident to the hearing held by the Department of Justice pursuant to 50 U.S.C. App. §456(j).* In order for the procedure to comport with traditional notions of fairness this Court has held that this hearing requires

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* In 1967 the statute was amended to eliminate consideration of conscientious objectors by the Department of Justice. Act of June 30, 1967, Pub. L. No. 90-40, §1(7), 81 Stat. 100, 104, codified at 50 U.S.C. App. §456(j).

nothing less than "a fair opportunity to the registrant to speak his piece before an impartial hearing officer . . . [and] to produce all relevant evidence in his own behalf . . .". *United States* v. *Nugent*, 346 U.S. 1, 6 (1953). "No sham substitute" will suffice. *Id.* at 7. "The Congress, in providing for a hearing, did not intend for it to be conducted on the level of a game of blindman's bluff," *Simmons* v. *United States*, 348 U.S. 397, 405 (1955), since "the right to a hearing means the right to a meaningful hearing . . ." *Gonzales* v. *United States*, 348 U.S. 407, 415 (1955).

The issue presented here is whether these notions of fundamental fairness are to be regarded as empty theoretical discussions by appellate justices or, rather, are to form the framework in which the United States must treat with its citizens. In essence this case demonstrates how a "meaningful hearing" held pursuant to all the procedural requirements developed by this Court and other courts for hundreds of years can be transformed into a mockery by an agency of the United States when it chooses to disregard wholly the fact-findings of that hearing (the only hearing held in this entire procedure).

By ignoring the basic finding of sincerity made by the Hearing Officer, the only issue before the Hearing Officer, and finding Messinger insincere—and so advising the appeal board—the Department of Justice (and the courts below which sustained this action) violated the spirit of this Court's decisions in *United States* v. *Nugent, supra, Simmons* v. *United States, supra,* and *Gonzales* v. *United States, supra,* and specifically ignored the letter of this Court's decision in *Morgan* v. *United States,* 298 U.S. 468 (1936). See also *United States* v. *Hagaman,* 213 F.2d 86 (3d Cir. 1954) and the recent decision of the Fourth Cir-

cuit in *United States of America ex rel. Tobias* v. *Laird*, No. 13,559 (4th Cir., filed July 25, 1969).

Notwithstanding the repeal of this specific hearing procedure, the responsibilities owed a citizen by his government when dealing with his rights always constitute important issues of federal law and should be considered by this Court. The function of the hearing in the administrative procedures of the United States is critical and it is of substantial importance that this Court review and focus that function.

2. The Appeal Board Actions

A. *Erroneous Legal Advice*

The Court of Appeals agreed that the Department of Justice advised the appeal board on the legal criteria for qualification as a conscientious objector "in a manner inconsistent with *United States* v. *Seeger*, 380 U.S. 163 (1965)" (9a). Nevertheless, it concluded that this was not prejudicial to Messinger. This conclusion constituted a total disregard for all notions of fairness, especially in view of the reliance by the Court of Appeals, in upholding the appeal board's rejection of Messinger's claim, on "evidence that his opposition to war was based on political, rather than religious, feelings" (11a).

The classification by the appeal board here, resulting from the recommendation of the Department of Justice,* was based upon a clear misstatement of the law. Surely if the decisions of this Court, in particular *United States*

* As Chief Justice Warren noted, the Appeal Board follows the recommendations of the Department of Justice in over 90% of the cases. *Gonzales* v. *United States*, 364 U.S. 59, 72 (1960).

v. *Seeger, supra,* are to have any effect, this Court must require the Department of Justice, at very least, when advising lay administrative bodies in situations where substantial personal liberties are involved, to correctly state the holdings of this Court.

Review is required here to protect not only the integrity of the decisions of this Court, but, even more importantly, the rights which they are designed to serve.

B. *Noninclusion of the Hearing Report*

The materials before the appeal board included every piece of paper, letter and form (including even envelopes in some situations) except two. The two items, admittedly prepared, not placed in Messinger's file and not submitted to the appeal board were the original FBI report and the Hearing Officer's report. While a "fair résumé" of the FBI report (in view of the governmental interest in protecting informers) may be sufficient, *United States* v. *Nugent, supra,* in a proceeding held principally to determine the sincerity of a registrant and involving only one hearing at which the registrant was permitted to appear—and in which the Department of Justice overturned the Hearing Officer's conclusions of sincerity—simple fairness dictates that this one piece of paper—the Hearing Officer's report—be included among the voluminous materials placed before the appeal board. Since the only issue for the appeal board to consider was Messinger's sincerity, the Hearing Officer's report, concluding that Messinger was *sincere,* was especially relevant.

The Court of Appeals dismissed this contention, concluding that the fairness of the summary of the report included in Smith's recommendation to the appeal board had not been questioned (10a). That is not the issue.

Rather, the question is whether basic fairness to Messinger required that the report, itself, be before the appeal board, especially here where Smith reversed the Hearing Officer. No competing government interest has ever been suggested which would require suppression of the Hearing Officer's report.

This is not a case like *Welsh* v. *United States,* 404 F. 2d 1078 (9th Cir. 1968), or *DeRemer* v. *United States,* 340 F. 2d 712 (8th Cir. 1965), where the Department of Justice adopted the conclusions of the hearing officer so that fairness did not require the hearing officer's report to be included in the file. However, as the court pointed out in *DeRemer,* it is clear that in a proper case a fair hearing might well require the availability of the hearing report to the registrant and thus to the appeal board. 340 F. 2d at 716. See *United States* v. *Purvis,* 403 F. 2d 555, 561-562 (2d Cir. 1968).

The combination of what was supplied and what was not supplied by the Department of Justice to the appeal board resulted in a denial to Messinger of a fair hearing by the appeal board.

Review is required if the guarantee of due process is to be fully implemented.

3. The Trial Court Actions

What transpired at Messinger's trial, and was approved by the Court of Appeals, was a complete frustration of justice clearly calling for the exercise of this Court's supervisory powers.

This Court has clearly directed the lower courts not to "sit as super draft boards, substituting their judgments on

the weight of the evidence for those of the designated agencies." *Witmer* v. *United States,* 348 U.S. 375, 380-381 (1955). But this rule must be applied equally both where a court is sympathetic with the agency's determination and where it might be unsympathetic.

The issues presented to the trial court were narrow and did *not* include Messinger's sincerity. What was before the trial court was whether there was a basis in fact for the classification and whether there had been due process in the administrative procedures. *Estep* v. *United States,* 327 U.S. 114 (1946). To arrive at its conclusion, what the court had to examine was the criteria employed or facts in Messinger's file relied on by the *appeal board* to reach *its* conclusion.

The activities undertaken by the trial court in this case constitute the precise abuse anticipated by Judge Weinstein in *United States* v. *St. Clair,* 293 F. Supp. 337 (E.D. N.Y. 1968). In reviewing St. Clair's selective service file, he found nothing to indicate what, if any basis, the board had relied upon to deny the claim. A search for some stray word in the file which would convince him—the trial judge —that some basis for denial existed could not answer the question of whether the board had relied on that, or any other, basis in fact or had just reached the right result by chance. In the absence of some statement by Selective Service as to *its* reason for denying the claim—i.e., *its* basis in fact—the defendant was acquitted. This same position was adopted in *United States* v. *Lonseth,* Criminal No. 68-128 (D. Ore., filed February 11, 1969), 1 S.S. L.R. 3359, where Chief Judge Solomon commented:

> "The Selective Service System has a responsibility to rule on a registrant's request. Court review is de-

signed to prevent isolated instances of arbitrary action. A court should not be forced to speculate on the local board's basis in fact for its decision." 1 S.S. L.R. at 3360.

However, what the trial court did here was to make its own careful examination of the file, cross-examine Messinger at length—hypothetically and out of context—and to arrive at its own conclusions and bases for why *it* would have denied Messinger's claim to conscientious objection classification.

Later, when two appeal board members were called to testify, the gentlemen admitted to no real recollection of Messinger or of his file (Flood, p. 500; Davis, p. 565). They testified to their principle reliance on the Department of Justice Recommendation (Davis, p. 566) in arriving at their conclusions. Yet, with this background of non-recollection, these two witnesses testified to precisely the two obscure points which had previously satisfied the trial court that there was a basis in fact for the appeal board's action. This was their testimony although no mention of these items, obscured in the file, was made either in the FBI resume or the Department of Justice recommendation. It strains credulity to suggest that this testimony resulted from anything other than the trial court's prior cross-examination of Messinger.

This Court must grant review to make it manifestly clear that the "basis in fact" test is a standard by which to test the arbitrariness of administrative action and not an invitation to a trial court to sift the evidence in search of its own "basis in fact".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX
Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 700—September Term, 1968.

(Argued June 25, 1969 Decided July 23, 1969.)

Docket No. 33399

UNITED STATES OF AMERICA,

Appellee,

—v.—

IRWIN IRA MESSINGER,

Appellant.

Before:

HAYS and FEINBERG, *Circuit Judges*, and JAMESON, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, George Rosling, *Judge*, convicting appellant, upon a trial without a jury, of refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. §462(a) (Supp. IV 1965-68).

Affirmed.

* Senior District Judge of the District of Montana, sitting by designation.

ELIHU INSELBUCH, New York, New York (Robert Layton, Richard E. Landau, Gilbert, Segall & Young, New York, New York, and Alan H. Levine, New York, New York, of counsel), *for Appellant.*

JEROME C. DITORE, Assistant United States Attorney (Vincent T. McCarthy, United States Attorney for the Eastern District of New York, of counsel), *for Appellee.*

HAYS, *Circuit Judge*:

Irwin Ira Messinger appeals from a judgment of the United States District Court for the Eastern District of New York convicting him, after a trial without a jury, on one count of refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. §462(a) (Supp. IV 1965-68).

We reject appellant's claim that he was improperly refused classification as a conscientious objector, and affirm the judgment.

I.

In 1963 appellant registered with the Selective Service System and in February 1964, he completed a classification questionnaire sent to him by his local board. Series VIII of the questionnaire calls upon a registrant claiming exemption as a conscientious objector to sign his name to a printed statement of conscientious objection. Appellant did not sign the statement. On February 19, 1964, he was classified 1-A.

In January 1965, appellant was sent a current information questionnaire. It did not specifically request information relating to conscientious objection but it did state:

"You may attach any additional information you believe should be brought to the attention of the local board." Appellant responded to the questionnaire, indicating that he intended to become a part-time student, but he made no statement pertaining to conscientious objection. On April 21, 1965, he was classified 2-S, the student deferment classification.

Appellant was sent another current information questionnaire in November 1965. He did not return it and, in December 1965, he was classified 1-A and ordered to report for a physical examination.

Appellant wrote to his local board appealing the classification on the ground that he had changed his status from that of full-time to part-time student in order to work to pay for his education and that he intended to become a full-time student in February 1966. The letter contained no indication that he considered himself a conscientious objector.

At the end of December 1965, appellant completed another current information questionnaire in which he made no mention of conscientious objection. At the same time, he executed a dependency questionnaire in which he stated: "I very much want to finish my schooling before going into the service." He testified at trial that he intended this sentence to be understood in its ordinary meaning of unrestricted military service and that its representation was false because, in view of his opposition to war, he did not intend to serve in the armed forces.

On January 25, 1966, the appeal board affirmed appellant's 1-A classification. On February 9, 1966, the local board received a letter from appellant stating that he was a "full time matriculated night student . . . taking 13 credits." The following week appellant was mailed an order

to report for induction on March 2, 1966. The local board, acting on its own motion, then rescinded this order and classified him 1-S(c), a classification which permits a registrant to finish the school term during which he was ordered for induction.

In May 1966, appellant executed another current information questionnaire in which he again failed to mention any claim to conscientious objector status. He was reclassified 1-A in June and wrote to request a "personal appeal" on the ground that he would be a full-time student in the fall. After appellant had appeared personally before the local board, it affirmed the 1-A classification. On August 16, 1966, the appeal board upheld the local board's classification. The classification was appealed to the national selective service appeal board which affirmed the local board's action on October 13, 1966.

In August 1966, after the appeal board had acted, but prior to the decision of the national selective service appeal board, appellant wrote to his local board:

> "I would like to request a conscientious objector form due to the fact that I will not be getting my student deferment. I felt it would be no need to express my beliefs regarding this matter of fighting and war if I had my student deferment. That is the reason I had never requested this status before, but now it is necessary for me to do so."

An F.B.I. summary of a letter written by appellant to Adelphi College on August 25, 1966, states: "[O]nly at the time of writing of this letter did the registrant begin to realize that his life would be ruined if he had to go into the Army."[1]

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1 The letter was not produced at trial but the fairness of this summary of it has not been challenged.

The local board sent appellant its conscientious objector form which he completed and returned on August 31, 1966. In it he stated:

> "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces."

He attributed these views to his Jewish background and asserted that he had acquired them "starting some ten years ago."

On November 15, 1966, the local board unanimously determined that the information submitted in appellant's conscientious objector form did not warrant a change in his classification. On November 22, 1966, the local board received a letter from appellant in which he requested a hearing and stated:

> "I would like to repeat what was stated in SSS Form 150 [the conscientious objector form]; that is I was a conscientious objector to war and killing since I can remember but had not gone through the trouble of filing Form SSS 150 before because I thought I would have my student deferment.
>
> "When I saw that I would not be granted a student deferment, I filed SSS Form 150. I am telling the truth about being a pacifist and would like to be given a chance to prove it."

After holding a hearing on January 10, 1967, at which appellant appeared, the local board affirmed his 1-A classification by a vote of 4-0. Appellant then sought review by the appeal board.

Under the procedure then in effect,[2] the appeal board would tentatively determine the validity of a claim to conscientious objector, 1-O, status. If it decided against the registrant, his file was sent to the Justice Department for its advisory recommendation. The Justice Department would make an inquiry and hold a hearing "on the character and good faith of the conscientious objections of the registrant." It would send its recommendation to the appeal board and to the registrant. The appeal board would review the file sent by the local board, the Justice Department recommendation and any reply to that recommendation made by the registrant. The appeal board would decide without hearing oral testimony or argument; it would not issue an opinion and would record its decision simply by classifying the registrant.[3]

Appellant's file reached the appeal board in January 1967. It tentatively determined that the 1-A classification was appropriate and referred the matter to the Justice Department which directed the F.B.I. to make the required inquiry. Prior to the hearing, a resume of the F.B.I. report was given to appellant and the report was given to the hearing officer. Appellant sent the hearing officer a letter to "explain and refute some of the points" in the resume. Appellant's selective service file was forwarded to the hearing officer. After holding the hearing on August 29, 1967, the hearing officer wrote a two-page report in which he

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2 Selective Service Act of 1948, ch. 625, §6(j), 62 Stat. 604, 612-13, as amended by the 1951 Amendments to the Universal Military Training and Service Act, ch. 144, §1(q), 65 Stat. 75, 86, codified at 50 U.S.C. App. §456(j) (1964). The regulations relating to this procedure were codified at 32 C.F.R. §§1626.25-.27 (1949, 1957, 1963).

3 In 1967, the law was amended to eliminate consideration of a conscientious objector claim by the Department of Justice. Act of June 30, 1967, Pub. L. No. 90-40, §1(7), 81 Stat. 100, 104, codified at 50 U.S.C. App. §456(j) (Supp. IV 1965-68).

found appellant to be sincere in his assertions of conscientious objection. However, in making the recommendation of the Justice Department to the appeal board, the chief of the Department's conscientious objector section refused to accept the hearing officer's conclusion as to appellant's sincerity and found him to be insincere. In reaching this conclusion, he relied on appellant's long delay in asserting his conscientious objector claim, the fact that appellant's sincerity was questioned throughout the F.B.I. resume of its inquiry, the evidence that appellant felt his life "would be ruined" if he had to go into the Army and evidence that appellant's beliefs were politically, rather than religiously, motivated.

Appellant received a copy of the Justice Department's recommendation and, in January 1968, wrote to the appeal board in support of his claim to conscientious objector status. The appeal board voted 3-0 to classify him 1-A. It did not write an opinion and, as noted above, was not required to do so.

After routine processing, defendant was ordered to report for induction. He appeared at the induction center, as ordered, on March 20, 1968, but refused to submit to induction. This refusal forms the basis for the conviction from which this appeal was taken.

II.

Appellant's first contention is that the Justice Department had no authority to reverse the hearing officer's finding as to his sincerity. He argues that this procedure denied him a fair hearing and that the reversal of the hearing officer was capricious.

In *Gonzales* v. *United States,* 364 U.S. 59 (1960), the Supreme Court considered the status of the hearing offi-

cer's report under the procedure pursuant to which appellant's conscientious objector claim was processed. It concluded that "the hearing officer's report is but intra-departmental . . . and . . . is not the recommendation of the Department. . . . It is but part of the whole process within the Department that goes into the making of the final recommendation to the appeal board." *Id.* at 63. Moreover, both the statute and the regulations speak of the recommendation of the Department of Justice, rather than of the recommendation of its hearing officer. Thus, in making its recommendation, the Justice Department was not barred from reversing its hearing officer.

Appellant's contention that the review of the hearing officer's recommendation denied him a fair hearing is based on a misconception of the procedure then in effect. As noted above, the hearing was but one factor to be considered by the Justice Department in making its recommendation. Appellant does not contend that he was denied a fair hearing before the hearing officer. The requirement of a hearing was therefore met.

The Justice Department's reversal of its hearing officer was not capricious. There was evidence to support the Department's conclusion that appellant was not sincere, notwithstanding the conclusion reached by its hearing officer after talking with appellant.

III.

The second contention made by appellant is that he was denied a fair hearing before the appeal board. He argues that the Justice Department's recommendation to the appeal board contained an erroneous statement of law and a misleading statement of fact and that the hearing officer's report should have been included in the file presented to the appeal board.

Appellant claims that the recommendation misstated the applicable law as to qualification for conscientious objector status by describing the beliefs needed to qualify in a manner inconsistent with *United States* v. *Seeger*, 380 U.S. 163 (1965), which affirmed *United States* v. *Jakobson*, 325 F. 2d 409 (2d Cir. 1963). While this contention is correct, we find that the misstatement of law did not prejudice appellant. The recommendation was based on the Department's finding that appellant's alleged beliefs were not sincerely held. The Department did not conclude that appellant's beliefs, if sincerely held, would not qualify him for conscientious objector status. Thus we do not have the situation arising in *Jakobson* and in *United States* v. *Englander*, 271 F. Supp. 182 (S.D.N.Y. 1967), where the Department concluded that the registrant's beliefs were insincere but improperly concluded that, if sincerely held, they would not qualify him for classification as a conscientious objector. There the convictions were reversed because it was not known whether the appeal board had based its decision on the improper standards used by the Department in finding that the registrant's alleged beliefs were not such as to justify granting conscientious objector status. Moreover, here two of the three appeal board members testified that they found appellant to be insincere in the beliefs underlying his conscientious objector claim. Such testimony follows precisely the procedure recommended in *Jakobson* for resolving any ambiguity in the appeal board's action. 325 F. 2d at 417.

The allegedly misleading statement of fact in the Justice Department's recommendation was:

> "As a matter of fact, no mention of conscientious objection was made until long after the registrant had been originally classified 1-A, found acceptable for service, and ordered to report for induction."

Appellant claims that this statement conveyed to the appeal board that, "having exhausted all administrative remedy and having been ordered for induction, [he] stood at the induction station and there for the first time urged his conscientious objections."

The statement correctly describes appellant's selective service history but it does not indicate that the induction order referred to was rescinded so that appellant could complete a semester at school and that the assertion of his conscientious objector claim occurred after the semester had ended and he had again been classified 1-A by his local board and by the appeal board. We find that inclusion of this statement in the Justice Department's recommendation did not prejudice appellant. The appeal board had before it appellant's selective service file which showed that he did not raise his claim while the induction order was outstanding. We have no reason to doubt that the appeal board was aware of this fact when it passed on appellant's claim and thus we have no reason to believe that it was misled. Moreover, appellant was given a copy of the recommendation and was permitted to submit to the appeal board his comments on its contents.

The failure to include the hearing officer's report in the file sent to the appeal board did not deny appellant a fair hearing. The report was comprehensively summarized in the Department's recommendation; appellant does not contend that the report or the summary of it was inaccurate. Cf. *United States* v. *Purvis*, 403 F. 2d 555 (2d Cir. 1968).

IV.

Appellant argues that the record does not support the appeal board's refusal to grant him conscientious objector status.

A court may overturn a classification made by the selective service system only if the classification has "no basis in fact." See, e.g., *Witmer* v. *United States*, 348 U.S. 375, 380-81 (1955); *Estep* v. *United States*, 327 U.S. 114, 122-23 (1946); *United States* v. *Gearey*, 379 F. 2d 915, 921 (2d Cir.), cert. denied, 389 U.S. 959 (1967); *United States* v. *Corliss*, 280 F. 2d 808, 810-11 (2d Cir.), cert. denied, 364 U.S. 884 (1960).[4] Under this very limited scope of review, the appeal board's decision must stand. The evidence of insincerity—appellant's long delay in raising his claim, together with his explanation that it would have been too much "trouble" for him to do so, his feeling that his "life would be ruined" if he had to serve in the military, and evidence that his opposition to war was based on political, rather than religious, feelings—provides a "basis in fact" for the appeal board's decision.[5]

V.

Appellant's final contention is that he was denied a fair trial by the conduct of the judge. The active role that the judge played in developing the facts in this non-jury case did not deny appellant a fair trial.

Affirmed.

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4 The "basis in fact" standard of review was made statutory by the Military Selective Service Act of 1967. See 50 U.S.C. App. §460(b)(3) (Supp. IV 1965-68).

5 The fact that some of the evidence referred to in the recommendation did not otherwise appear in appellant's selective service file did not prevent reliance on it by the appeal board. See *United States* v. *Purvis*, *supra*, 403 F. 2d at 559.

Opinion of the District Court

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

Plaintiff,

against

IRWIN IRA MESSINGER,

Defendant.

68-CR-333

Appearances:

Joseph P. Hoey, Esq., United States Attorney, Eastern District of New York, Attorney for Plaintiff, Michael Rosen, Esq., Assistant U. S. Attorney of Counsel.

Glass & Glass, Esqs., Attorneys for Defendant, Joseph G. Glass, Esq., Of Counsel.

Opinion Including Findings of Fact.

ROSLING, J.:

Defendant, Irwin Ira Messinger, was charged in a single count indictment with an offense under Title 50 U. S. C., App. §462(a). Specifically it is alleged that on or about and between March 20, 1968, and September 19, 1968, defendant, a registrant pursuant to the Military Selective Service Act of 1967 and Proclamations and Regulations etc., knowingly refused and failed to submit to induction in compliance with the notice given him by his Local Board No. 3 requiring him to report on March 20, 1968.

Having waived trial by jury, defendant was tried to the Court which at the conclusion of the evidence denied his motion to dismiss[1] and announced that it had found

him guilty as charged. The Court noted at the time that there was no requirement for it to make findings unless a request were made by the defendant.[2] The defendant had made no request for findings. In the initial stage of the trial relative to the validity of the 1-A classification of defendant determined by his local board and its rejection of his claim to be entitled to a 1-0 classification as conscientious objector, the Court had rendered informal findings from the bench. These upheld the classification as resting upon a basis in fact. In the second stage of the trial nothing was in controversy, for defendant had substantially stipulated the willfulness of his refusal to submit to induction. A full evidentiary presentation by the government was, accordingly, unnecessary except for the introduction of some official records relative to the induction proceedings.

Notwithstanding defendant's failure to request special findings the Court feels that in the interest of an adequate record, its findings should be formalized and reduced to writing before the imposition of a sentence which will merge in the judgment of conviction.[3]

In implementation of such procedure the Court immediately following its rendition of the verdict of guilty requested the United States Attorney to submit findings in conformity with those announced by the Court. Before government counsel could comply with such instruction the Court of Appeals of the Circuit on November 14, 1968, decided *United States v. Purvis*. The analysis of a number of earlier decisions in *Purvis* persuaded this Court to the view that instead of filing bare and unannotated findings an opinion embodying a more detailed factual statement should be drafted and filed by the Court itself. With such preamble the Court now turns to synopsizing the proof upon the evaluation of which its verdict is grounded.

Defendant's classification questionnaire (Form 100) was executed by him on February 4, 1964, and received by his local board two days later. Among other matters it noted his date of birth as March 25, 1945—he was, therefore, almost nineteen years of age—, and that he had completed one and one-half years of College (Adelphi University), where he was majoring in psychology.

Series VIII of the questionnaire, headed "Conscientious Objector" contained printed instructions to the registrant:

> "(DO NOT SIGN THIS SERIES UNLESS YOU CLAIM EXEMPTION AS A CONSCIENTIOUS OBJECTOR)
>
> By reason of religious training and belief I am conscientiously opposed to participation in war in any form and hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150).
>
> .....
> (Signature)"

Messinger did not sign the Series VIII claim of exemption.

On February 19, 1964, he was classified 1-A by his Board, and on the 20th given formal notice of such classification (Form 110).

On January 12, 1965, the local board received from defendant a Current Information Questionnaire executed by him on January 10, 1965 (Form 127). It had been routinely forwarded to him by the Board several days earlier. The form called for data under various titles including "Present Occupation," (Series IV), and "Education," (Series V). It did not directly request that information be furnished as to "Conscientious Objections," if any, of the registrant, but clearly called for the assertion of such possible claim by the instruction contained in the opening paragraph of the questionnaire, ad-

vising that "[y]ou may attach any additional information you believe should be brought to the attention of the local board."[4]

Responding to the questionnaire, defendant gave his occupation as assistant manager of the toy department of a discount center which was engaged in the business of retail selling. He had been employed in such capacity for the preceding ten months.

In his Series V.—Education statement he indicated that he was no longer in attendance at college, leaving the inference to be drawn that he had dropped out shortly after the filing of his Classification Questionnaire in February 1964,[5] for he continued to report in the Current 127 Form the same year-and-a-half of education at Adelphi University that he had declared in the Form 100. He had, moreover, by striking and interlineation changed the printed representation of the Form 127 "I am a full time student at" to read "I will be a part time (9 credits)—starting Feb., '65 student at Nassau Community College." The balance of the answer with printed matter underscored was "majoring in psychology preparing for psychology and expect to receive a degree on
(Occupation or profession)
? "
(Date)

On April 21, 1965, the local board approved a 2-S student deferment classification and so notified him.

On November 30, 1965, a further Current Information Form was mailed to Messinger for completion, and when it was not returned, he was reclassified 1-A and notified by the usual Form 110.

On December 22, 1965, an Order to Report for Armed Forces Physical Examination (SSS Form 223) was mailed to defendant by the Board. Messinger had on the same day crossed this notice in the mails with a letter of his own addressed to the Board (received by it on the 27th)

in which he appealed his 1-A classification. His letter alleged the "poor financial position" of his parents as compelling him to accept full time employment in order to obtain sufficient funds to pay for his education. This, he explained, accounted for dropping out of Adelphi as a full time student and his taking part time courses thereafter. His letter concluded with the following plea:

> "Please reconsider my 1-A classification to allow me to go full time in February, 1966, by granting me a student deferrment [*sic*] classification.
>
> "I am seriously working toward my Ph D in psychology and would like very much to reach this goal without additional hardships."

There was nothing in this letter or any earlier document which might suggest that he was in any sense a conscientious objector. Yet, if his later statements were to be accepted as sincere expressions of his views at the time, these had already crystallized and existed for a number of years. (See *infra* pp. 14, 16.)

On December 30, 1965, a letter was addressed to the Board, (received by it January 3, 1966), by the Nassau Community College advising that it was sent at the request of Messinger "presently attending as a part time, non-matriculated student." He had "enrolled for the maximum credit hours allowed as an evening student and has applied for full-time matriculated status for the Spring 1966 semester." His acceptance for matriculation would depend on the final grades for the semester, to be issued January, 1966.

On January 3, 1966, the local board received from defendant another Current Information Questionnaire which he had executed December 30, 1965. In it he reported his occupation as that of salesman and repairer of jewelry. The data he supplied in answer to the Series V. —Education questions was inconsistent with that earlier

furnished and somewhat confused. Thus he now declared he had completed *one* year, not *one-and-a-half years* of college, majoring in psychology. He named the colleges as Adelphi, Farmingdale, and Nassau. He represented that he *"will be* a full-time student (in Feb. *1965)* at Nassau Community College • • • majoring in psychology preparing for Psychologist and expect[ed] to receive a degree on Feb. 1967." (Underscoring added.) The year 1965 he supplied was presumably a slip, 1966 being intended.

Yet once more, although the opportunity was clearly offered to him, he failed to make a claim of conscientious objections. Defendant, indeed, had, while pressing his claim for student deferment, advanced another ground for his exemption from service which negatived any intent on his part to refuse full military service. Such other ground was urged by him in his answers in a Dependency Questionnaire he filed with the local board on January 3, 1966. His representations sworn to December 30, 1965, included the following avowal:

> "The reason why I am appealing my 1-A classification to 2-S is because I have been attending school part time and working full time to pay for it. I finally have enough credits to get matriculated at Nassau Community College this Feb. I also contribute $25 a week to my father to help pay for his expenses. I very much want to finish my schooling *before going into the service."* (Emphasis supplied.)

Defendant testifying in his own behalf at the trial acknowledged that he intended the underscored phrase to be understood by the SSS in its ordinary sense of unrestricted military service, i.e. service in the army, rather than in the special 456(j) sense of "civilian work contributing to the maintenance of the national health, safety,

or interest" etc. (For illuminating excerpts from such testimony, see *infra* p. 24).

The Series VIII "Statement of Dependent" in the form mentioned was made and signed by defendant's father Harold. It surely discloses more than the affiant intended. It reads:

> "I had to rely on my sons help because I was discharged from my job after 18 years because I was too old. I was unemployed from Dec 1964 to June 1965. I wasn't covered by unemployment insurance and went into debt. I borrowed $1500 from the Community Bank and my son's help is allowing me to repay and get on my feet. I also feel guilty of delaying his education and want him to complete his education."

The father's unemployment is thus alleged to have first begun in *December 1964*. Defendant had, however, been dismissed due to poor grades" *seventeen months earlier* on July 19, 1963. (See FBI resume, p. 1, and Adelphi Suffolk College Undergraduate College Student Certificate (Form 109)).

On January 25, 1966, the Appeal Board to which defendant had applied for review unanimously affirmed the 1-A classification and returned registrant's file to the local board from which it had been received.

On February 9, 1966, the local board received a letter dated the 7th from Messinger that he was "now a full time matriculated night student at Nassau Community College taking 13 credits."

The following week the local board mailed defendant a notice of induction, (Form 252), requiring him to report on March 2, 1966. Such notice, was, however, rescinded by routine action of the local board taken of its own motion on March 22, 1966. On that date the Board issued, under its general practice, a 1-S(c) classi-

fication, which had the effect of permitting defendant as a college student otherwise subject to induction to finish out the semester during which he was being called up for military duty.

On May 31, 1966, Messinger filed with his Board a third Current Information Questionnaire which he had signed two days earlier. He represented therein that he had no "Present Occupation" as he was a full-time student. The education division of the questionnaire contained some answers which are inconsistent with those given in the two previous Form 127's he had filed. For some reason, which is not made clear, he declares that he has completed (only) one year of college, majoring in Psychology and that having been received at Nassau Community instead of at Adelphi as recited in the Classification Questionnaire and prior Current Information Questionnaires. He does not mention Adelphi or any other institution of higher learning. But for the third time he ignores the invitation to bring to the attention of the local board additional information affecting his classification, specifically any conscientious objections entitling him to exemption from military service.

On June 21, 1966, the semester having concluded, the Board notified Messinger that his 1-S(c) had been superseded by a 1-A classification.

Messinger now filed with the Board on June 24, 1966, a letter dated May 2, 1966, he had received from Nassau Community College advising him that he had been accepted as a matriculated student in the day division for the semester beginning September, 1966. The acceptance was conditional. It "assumes that you will successfully complete your present program of studies." Having met the condition, Messinger on June 24, 1966, wrote the Board a letter it received on the 27th, in which he asked for a "personal appeal due to the fact that I was last semester and will be next semester a full time matriculated student at Nassau Community College."

The summary of his personal appearance before the Board on July 21, 1966, discloses the following:

In response to his claim of entitlement to student deferment the Board explained that Selective Service regulations did not permit a registrant to attend a 4 year school (college) and to transfer to a 2 year one. "This is not progressing satisfactorily."

Messinger is then recorded as saying that "I went to Adelphi full-time for 1 year but I was dismissed so I went to night school"; that he had graduated from high school in June 1962 and had received 15 credits from Adelphi which were transferred to Nassau. He had received an additional 3 transferable credits from "night school at Farmingdale." He had entered Nassau in January, 1965, and had thus far accumulated 41 credits toward the 65 required for an "Associates (two year) Degree." He needed, so he said, another year for such degree.

At the conclusion of the July 21st hearing the Board reaffirmed the 1-A classification by a unanimous vote and forwarded the registrant's file to the Appeal Board a week later. On August 16, 1966, the letter with like unanimity upheld the local board's 1-A classification.

The New York State Director thereupon on August 19, 1966, filed a notice of appeal to the National Selective Service Appeal Board in Washington, D. C. in the registrant's behalf from the 1-A classification. Such appeal resulted in a unanimous affirmance on October 13, 1966, of the 1-A classification.

Messinger had in the meantime and without awaiting the outcome of such presidential appeal at long last unmasked himself as a conscientious objector, and one whose scruples were of long standing. In a brief, undated holographic note, time-stamped as received by the local board on August 23, 1966, he had announced his views as follows:

> "I would like to request a conscientious objector form due to the fact that I will not be getting my student deferment. I felt it would be no need to express my beliefs regarding this matter of fighting and war if I had my student deferment. That is the reason I had never requested this status before, but now it is necessary for me to do so."

It may serve as a preliminary adumbration of a frame of reference for this initial confession of defendant's faith and the ferment of his thoughts as he later expressed them to turn back at this point to a letter he wrote on August 25, 1963, to the Adelphi College. A summary of the contents of such letter is to be found in the FBI resume reading as follows:[7]

> "A discussion of his performance at college: A statement that the registrant did not properly apply himself while at the college; and comment to the affect [*sic*] that only at the time of writing of this letter did the registrant begin to realize *that his life would be ruined if he had to go into the Army.*"

The language which the Court has underscored for convenient reference thereto, as will later be shown, impressed the Appeal Board members who were called upon to review his claim of conscientious objection as further evidence of concern for his personal economic situation and as negativing any sincere dedication to the high moral principles he professed to espouse.

But to turn back to our narrative in its chronological sequence: The local board on August 23, 1966, responsive to his request duly mailed Messinger its "Special Form For Conscientious Objector," (Form 150). This defendant filled out and executed, and thereupon returned to the Board on August 31, 1966.

On the first page of the document defendant had designated and signed Series I.—Claim for Exemption, Par. (B), by which act he made the following representation:

> "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces."[8]

In Series II of the form calling for "Religious Training and Belief" Messinger referred in justification of his conscientious position to the decalogue generally, rather than to a specific commandment as enjoining that "Thou shalt not kill." As for the length of time he had held these views, he ascribed them to his Jewish background and asserted that he had "acquired these convictions starting some ten years ago."

It may be noted, parenthetically, if this chronology is correct he was by much less than completely frank when in seeking to get a hardship deferment he represented to his local board on his dependency questionnaire on December 30, 1965, eight months to the day previously, that it was his desire to finish "my schooling before *going into the service,*" (see *infra* p. 23 for discussion), as prompting him to apply for deferment.

Generally uninformative and inconclusive save for a list of personal references, the executed conscientious objector questionnaire is of interest chiefly for the negative implications of what Messinger affirmed. In Series IV—captioned "Participation in Organizations" the registrant, as was to be expected, disavowed membership at any time in "any military organization or establishment." On the other hand, when instructed by the form to describe

his "relationships with and activities in all organizations • • • other than military, political, or labor organizations," he was able to cite only the Boy Scouts and Sea Explorers (between the ages of 11 and 17), and at a later period, the National Model Railroad Association and the National Investigations Committee on Aerial Phenomena. The latter, he explained, was "an aid to my psychology studies."[9]

On November 15, 1966, the local board reviewed defendant's conscientious objector form and immediately advised him of its (unanimous) determination that "the information submitted does not warrant a change in your classification."

Messinger's reaction was to write another of the letters which ultimately in its unhappy, but revealing phrasing, manifested according to the appeal board members who testified at the trial the workings not of a mind driven by an ineluctable conscience brimming with love for one's fellowman, but rather the calculating contrivance of an individual mouthing ethical phrases while, in truth, coolly scheming for personal advantage. The letter, dated November 20, 1966, reached the local board's files two days later. It opened by requesting a hearing and then continued:

> "I would like to request a hearing appealing your determination that the information submitted does not warrant a change in my classification.
>
> "I would like to repeat what was stated in SSS Form 150; that is I was a conscientious objector to war and killing since I can remember but *had not gone through the trouble of filing Form SSS 150 before* because I thought it would be unnecessary because I thought I would have my student deferment.
>
> "When I saw that I would not be granted a student deferment, I filed SSS Form 150. I am

telling the truth about being a pacifist and would like to be given a chance to prove it." [Emphasis supplied.]

The hearing was finally scheduled by the local board for January 10, 1967, at which time Messinger appeared in person. The Board's letter of notification to the registrant dated January 3rd advised him that "[i]f possible you should submit prior to or at the meeting, a written statement including any supporting documents outlining the reasons for your request for deferment."

The local board's "Summary of Personal Appearance" of Messinger "Before Local Board" on January 10, 1967, which forms part of the file later transmitted and considered by the Appeal Board sets forth with substantial completeness and accuracy the proceedings minuted in the document. This finding is justified by defendant's own testimony given at trial and exhibits adduced by him notwithstanding his staccato and at times almost incoherent assertions that the record was inaccurate, and that the Board was inattentive to the statements Messinger was permitted to make and hostile to the reception of other testimony he intended to offer.

At the conclusion of the hearing the local board informed the registrant that it would let him know what action it decided upon. After he left the hearing room the Board reviewed the file as augmented at the hearing by the letters Messinger had produced or caused to be written to the Board.[10]

The local board by action taken the very day of the hearing unanimously confirmed the 1-A classification. But the only memorandum of this transaction is the bare entry of the vote of the Board—4-0—upon Messinger's Classification Questionnaire. The basis for the determination is not disclosed nor reflected in any opinion, written or oral. In thus proceeding the Board was following the practice prevalent at the time, a practice consistent with

relevant law and regulations. Under these no duty was imposed upon a local board to articulate findings or conclusions. The bald record of the classification determined sufficed.[11]

We are, however, not left without a clear indication as to what led the local board to reject the defendant's claim of conscientious objection he belatedly advanced, nor does uncertainty exist as to whether the Board's reasons for its actions were valid or otherwise. We do not find here an ambiguity so pervasive that the essential rational basis in fact for what was decided is obscured.[12] A valid underpinning is clearly to be deduced from the tenor of the colloquy between the local board members and defendant, as it is presented in the summary of the January 10, 1967, hearing. No verbatim or more detailed record of the interview was made than the summary furnishes. Yet, with none of the local board members nor Miss Miller, the Board secretary, called to testify at the trial, and with the defendant taking the stand to challenge the accuracy of the summary, we find in defendant's testimony the elements that serve to bolster and authenticate the summary as accurate. That record, standing alone, would, however, have been entitled to credit derived from the presumption of regularity and performance of public duty accorded to official files documenting official performance.

That the summary is brief does not militate against its accuracy for it purports to be a precis of an interview whose brevity defendant himself criticized in his testimony. Yet, he was frank to acknowledge that he had been permitted at the hearing to, and, in fact, did submit at the hearing and earlier voluminous documents, hopefully, substantiating his position and elaborating upon his philosophy. He did not with any vigor urge upon this court that he had been prevented from telling the local board orally what his views were. It was only when he sought

to expound them repetitiously and at greater length that the Board, already possessed of the not inconsiderable documentation he had provided, and no doubt anxious to peruse and discuss what he had provided, and to proceed with other business on their agenda, that he was cut short by the Board with the equivalent of our judicial commonplace, "Decision reserved, we will look at your papers."[13]

Much that is recorded in the summary was acknowledged by defendant to be a fair condensation of the actual colloquy. Messinger, however, challenged the accuracy of the record in two respects. The first of these related to the use ascribed to him in two answers therein of the word "trouble." The initial instance of such use is reported as follows: [Underscoring in the excerpts is supplied.]

> "B[oard] You never filed a claim as Conscientious Objector before. You didn't even sign SSS Form 100, the original Classification Questionnaire.
> "R[egistrant] It was too much *trouble*."

The second appearance of the word is found in the following quotation:

> "R[egistrant] * * I never signed the claim as a Conscientious Objector because I had a 2-S deferment.
> "B[oard] If your beliefs were strong enough, you would put the C. O. Classification above everything else, you either are or you aren't, You were going down the middle of the road. Your faith should be the most important factor of your life.
> "R[egistrant] It is.
> "B[oard] Then why didn't you claim it at that time?
> "R[egistrant] As I said before, it was too much *trouble*."

It was defendant's "explanation," given at the trial, that while he admittedly employed the word, such use was not intended in the sense assigned to it by the local board. It was upon his father's advice, so he testified he had told the local board at the hearing, that he had not claimed a conscientious objection exemption when first registering upon attaining the age of 18 years. His father had persuaded him not to invite trouble—the expression is the court's paraphrase, for the defendant was not thus explicit—by needlessly claiming a conscientious objector exemption when he already had a student 2-S deferral which would cover him for an indefinite future. It was only after he had lost his 2-S status because of his failure to maintain his scholastic rating and he was unable to induce the local board to accord him a hardship deferment with his father named as the "dependent" that he "faced reality" and announced his conscientious scruples against participating in war, basing such attitude upon his religious training and belief.

At the trial Messinger initially denied that he had used the word "trouble" or a phrase containing it in the course of his January 10, 1967, hearing.[14] When, however, he was confronted with a letter he had written to the local board on November 20, 1966, in which he sought the hearing ultimately held on January 10, 1967, he retracted his earlier denial of such use in writings he had authored. The letter contained the following:

> "I would like to repeat what was stated in SSS Form 150, that is I was a conscientious objector to war and killing since I can remember but had not gone through the *trouble* of filing form SSS 150 before because I thought it would be unnecessary because I thought I would have my student deferment." [Emphasis added.]

The letter seemed to refresh his recollection and after reading it he was not so insistent in his testimony that the local board's summary of the January 10, 1967, session was to a degree fictional.

The second of the two matters in respect of which defendant charged that the summary was other than factual dealt with the following abstract of defendant's interrogation at the hearing, and in particular the expression "wild goose chase." In pertinent part with preceding question and answer repeated for continuity, the summary reads:

> "B[oard] Then why didn't you claim it [conscientious objection] at that time [in Series VIII of the Classification Questionnaire]?
>
> "R[egistrant] As I said before, it was too much trouble.
>
> "B[oard] You led everyone on a wild goose chase.
>
> "R[egistrant] I did not, I did what I felt was right.
>
> "Q. For your benefit and ours, if you had applied for this originally you would have saved everyone a lot of trouble.
>
> "B[oard] Would you agree to Non-combatent service?
>
> "R[egistrant] No, I would be under military order."

It may be well to note at the outset that after some examination by Court and government counsel defendant conceded that under the circumstances the Board was fairly assessing the situation when it recorded in the summary a feeling that it had been led on a wild goose chase. Defendant acknowledged that the expression had in fact been uttered by a Board member at the hearing.

How he came to make such concession makes interesting reading and undoubtedly reflects the source of the local board's attitude of disbelief as it contemplated the sincerity of his professions of a lofty ethical motivation. After some quibbling with the distinction between serving one's country in non-military activities and rendering military service, which he swore his conscience would not permit him to accept, defendant admitted that if he had ever used the expression "going into the service" he could only have meant military service. He was then confronted with the statement he had made and signed on December 30, 1965, in which in Series VII of such Dependency Questionnaire he had declared that "I very much want to finish my schooling before *going into the service.*" [Emphasis added.] He thereupon acknowledged that by the use of the underscored phrase he intended to have his local board understand that if he were permitted to continue his college education during a 2-S deferment, he would at its conclusion enter the military service; that at the time of such representation with ten years of conscientious objection to participation in war as the paramount influence in his thinking, the representation was false, as he never intended to submit to military service. The local board's estimate of such procedure on his part as putting them to a "wild goose chase" he conceded was fair. His precise language in the testimony given at trial was as follows:

> "The Court: So that at the time you were telling the board, this very board, that if they gave you the student deferment you would go into the service, and this being since December 30, 1965, you were intending to lead them to believe that you were going to go into military service, or were you holding something back?
>
> • • •

"The Witness: I was holding back the fact of my own reality that I will have to face this and I was holding back from them the fact that I would not be going into military service at all.

"The Court: You were telling them that you were going to go into service if they gave you the student deferment?

"The Witness: That is true.

"The Court: Now getting back to the 'Wild goose chase,' just looking at that as though you were an outsider, wouldn't you feel that if such a situation were disclosed here later that you were getting a 'wild goose chase,' if you were a member of the board?

"The Witness: Yes, sir."

From the local board's denial of his claim to exemption as a conscientious objector Messinger sought review by the Appeal Board under the procedure then in force, but since repealed."

The procedure delineated in C.F.R. § 1626.25 so far as pertinent briefly was as follows: The appeal board initially would make a tentative determination as to whether registrant was entitled to a 1-O (conscientious objector) classification. If its ruling was adverse to registrant's claim, the file was to be transmitted to the Department of Justice for the purpose of securing its advisory recommendation. The Department in performing such function would conduct an inquiry and hold a hearing "on the character and good faith of the conscientious objections of the registrant." In this instance the hearing officer designated by the Department was John Clark Toaz, and the inquiry conducted by the FBI.

The Department's recommendation would then be forwarded to both the appeal board and the registrant, the latter being simultaneously instructed that he had

thirty days thereafter within which to file with the appeal board a written reply concerning the recommendation.

The appeal board itself would limit its review to the record received from the local board, the advisory recommendation from the Department and any reply to the recommendation of the Department received from the registrant. (§ 1626.24) The decision of the appeal board arrived at without oral hearing, testimony or argument, would be simply one of classification of the registrant. In the performance of such function the appeal board was required to give consideration to the various classes in the same manner as that in which the local board classifies registrants.

Turning to the incidents of the Messinger review, we find the following:

On January 16, 1967, the local board transmitted his file to the appeal board for its review. The latter body, tentatively determining a 1-A classification appropriate, next passed the matter over to the Justice Department for its further processing. The Department called upon the FBI to make the statutorily enjoined inquiry. In compliance with the request the Bureau instituted its investigation, compiling a report of what it was able to develop. This report included the names and addresses of those who had been sought out by Bureau representatives for interview and had supplied information. The completed report was thereafter made available to Mr. Toaz and to the Department of Justice representative T. Oscar Smith, Chief of the Conscientious Objector Section. Mr. Smith personally or through a deputy later prepared the recommendation for transmittal to the appeal board. The FBI report was not, however, given to Messinger[16] or the appeal board, nor was it introduced into evidence at the trial.

The FBI had in conformity with the then current (June 26, 1967) practice prepared a "Resume of the In-

quiry" of which it delivered a copy to Messinger in advance of his hearing before Examiner Toaz. Later the resume was made available to the appeal board. The resume was marked in evidence as an exhibit at the trial.

On August 18, 1967, Messinger addressed a lengthy handwritten letter to Mr. Toaz. In the letter defendant noted that he had received the FBI resume and undertook to "explain and refute some of the points contained in this." On August 29, 1967, the examiner held his hearing. What he relied on is not set out by him with any definiteness. No verbatim record of the proceedings was taken, nor did Mr. Toaz in his testimony at trial indicate the extent of the minutes he took. From the whole he distilled a two page report in which he declared as his conclusion a belief that the defendant was sincere in his averments of conscientious scruples.[17]

The Justice Department's recommendation as well as the Toaz report was an exhibit at the trial. In its opening paragraphs it provides background information, noting Messinger's age, religious faith, education and his claim of conscientious objection on various forms. There then follows a fair summarization of the Toaz report, the recommendation then continuing:

> "On his SSS Form 150 the registrant stated in response to Question No. 3 of Series II that he received his religious training and acquired the convictions which formed the basis of his claim 'starting some ten years ago'; yet, he made no mention of such a claim a brief two and one-half years previously at the time of filing his SSS Form 100. As a matter of fact, no mention of conscientious objection was made until long after the registrant had been originally classified 1-A, found acceptable for service, and ordered to report for induction. Religious convictions of the nature

of conscientious objection to participation in war in any form arise from deep rooted and abiding beliefs held for a long period of time, and their assertion at a time when military service has become imminent for the registrant is not persuasive."[18]

Then turning its attention to the FBI resume, the Department's recommendation makes the observation that the "[r]egistrant's sincerity in putting forth his claim of conscientious objection on the basis of his alleged religious training and belief is questioned throughout the resume." This is followed by a reference to the registrant's letter of August 25, 1963, to Adelphi when in seeking reinstatement "he commented that only at the time of writing said letter did he begin to realize that his life 'would be ruined' if he had to go into the Army."

Passing to "two separate opinions" by persons interviewed expressed in the resume, the recommendation declares its concurrence in the Bureau's "questioning whether the registrant understands the meaning of conscientious objection and appraising his personal beliefs as transitory in nature" and its conclusion "that the registrant's convictions are not of long standing."

The recommendation finds, impliedly, a political quality in defendant's beliefs, remarking that although there was "evidence that registrant is clearly opposed to the participation of the United States in the Vietnam conflict, • • • those aware of his stand in this regard had no inkling of a religious basis for his position."[19]

The Department's memorandum to the appeal board concludes:

> "With due regard for the recommendation of the Hearing Officer, the Department of Justice concludes that the registrant is not sincere in his claim of conscientious objection; accordingly, it is

recommended to your Board that the registrant be not classified in Class 1-0 or in Class 1-A-0."

The FBI resume into which Mr. T. Oscar Smith, Chief of the Conscientious Objector Section thus dipped extensively for source material for his recommendation consists of five single-spaced meaty pages of typewriting. It appears to represent the unprocessed ore of a broad mining operation in which factual description is mingled with opinion. Some of that which was elicited is favorable, some unfavorable, to defendant's claims. While Messinger ascribes to Mr. Toaz remarks somewhat critical of the FBI's fairness in reflecting in the resume the contents of the report which it purported to summarize, the examiner, testifying before this court as a defense witness, was not asked whether he had made such criticism, nor did he inject any critical comment into the testimony he gave.

Mr. Toaz' report itself is barren of any critical comment or suggestion that the resume in any sense fell short of what it purported to be, a neutral summarization.

The resume itself takes no position as to the sincerity of Messinger's professions. In addition to supplying data concerning defendant which has been noted passim in the foregoing it purports to quote, relevantly and with pros and cons both represented, what the FBI agents had elicited from informants. These sources are described, but their identification remains concealed in the underlying FBI report.

As for the depths of Messinger's allegedly profound religious feelings drawn from the faith into which he was born and his training in that faith, both of which he puts forward as the wellsprings of his conscientious objections, the resume without comment records the following factual circumstance:

"The registrant indicated membership at Temple Beth-El, Jerusalem Avenue, North Massapequa,

New York. The rabbi at the temple advised that the registrant is not known to him and is not, as far as he knows, a member of the congregation. He added that the registrant may have attended 'unobstrusively' but apparently has never made known his religious feelings."

On August 18, 1967, Messinger, as earlier noted, *supra*, p. 27, had expounded his credo in a letter to Mr. Toaz on the eve of his hearing. The letter, identified as Exhibit A in the Department's Recommendation, was forwarded to the appeal board as a relevant exhibit.

Having received a copy of the Justice Department's Recommendation, Messinger under date of January 15, 1968, addressed a letter to the appeal board briefly animadverting upon a few unfavorable details of the memorandum. In the main, however, he urged upon the Board the sincerity of his views as enlarged upon in his prehearing letter of August 18th to Mr. Toaz which he asked the Board to peruse. The August letter does not lend itself readily or usefully to compendious analysis. The impression one derives from it is consistent with the local board's reaction that in the mosaic defendant's behavior depicted he had led them on a wild goose chase. The letter essays to explain away how it chanced that a person as strongly imbued with religious fervor and love of his fellowman as defendant now proclaimed himself to be, causing him to reject all war, had never once by word or deed evangelized nor sought to proselyte when it would have been troublesome for him to engage in such activity. One senses from the letter that "trouble" which he envisaged for himself if he spoke persuaded him to remain silent. But more than this, to avoid such trouble he affirmatively and purposefully deceived his local board by a misrepresentation that if he were but deferred so that he might complete his college education, he would,

once he had completed his schooling, enter the *military* service.

Messinger's letter addressed itself additionally to specific items in the resume, one of which reported an interview of Messinger's "former girl friend," (defendant's description), and another which purported to quote a professor who said he felt that the influence operating on defendant was "'left wing' ideas."

Seeking to avoid the charge of insincerity, but in fact confirming the observation, made above, of his not acting at a time when inaction was advantageous, the defendant's letter to Mr. Toaz stressed that defendant had first joined Students for a Democratic Society, the War Resisters League and the Jewish Peace Fellowship of Reconciliation "*after* (underscoring in the original) I filed for a C. O."[20]

The appeal board, similarly writing neither opinion nor decision, for neither the statute nor the regulations require any, and the Board practice appears to be that no more should be done than is required, by a unanimous vote (3-0) classified the registrant 1-A and so reported to the local board. (See 32 C. F. R. §1626.26 and §1626.27.)

The procedures which ensued, culminating in defendant's reporting at the induction center on March 20, 1968, only willfully to refuse to be sworn and to submit to induction, require no special comment (see stipulation, smp. 629 *et seq.*).

That due process was followed in the foregoing inquiry, hearing, recommendation and classification is amply supported by the authorities.[21] These reject the contention and overrule the only criticism that defense counsel appears now to level against the constitutional validity of those procedures, namely, that defendant was entitled at the various stages of the proceedings and at the trial itself to a disclosure of the names and addresses of the FBI interviewees.[22]

The requisite basis in fact for the finding of insincerity, in any event implicit in the appeal board's classification on review, is to be found in the testimony of two of the three members of the appeal board given at trial. The third member was unavailable, being at the time of the trial confined to a hospital with a two months' stay in prospect.

The procedure of having appellate board members testify to elucidate their findings on the basis of the record they had reviewed is appropriate and sanctioned by authority.[23] One of the members, Doctor Flood, a physician, believed registrant was insincere, Messinger had declared in his dependency questionnaire his intent to go into military service if accorded his 2-S deferment. He cited the circumstances that Messinger had not earlier disclosed the views he later professed, and disparaged defendant's attempt to excuse himself for his silence by saying it was too much trouble to fill out forms which would publicize his claim of conscientious objection. Messinger's delay in speaking up was, the Doctor felt, an adverse factor to be considered, but was not controlling. He accepted Messinger's assertion that he had religious training and judged he was sincere in such religious belief, but he did not "buy" his belated espousal of conscientious objection to war as sincere. The doctor was prepared, he said, to grant Conscientious Objector classification to one who was without religious training and belief provided he was sincere in his opposition to war.

He sought to sustain this expression of attitude by remarking that he had in many other instances voted for registrants who asserted conscientious objections. He disclaimed prejudices in this regard. Delay in making the claim did not bar its recognition, but was an element to be considered in evaluating sincerity.

The other member of the Board who testified at the trial was Amhurst W. Davis, a farmer. The tenor of his testimony was generally to the same effect as that given by Doctor Flood.

Conclusion

It is this Court's conclusion, therefore, that the appeal board's classification of the registrant Messinger as 1-A had the requisite rational basis in fact in the appeal board's judgment that the claim of conscientious objection was insincere and false. The Court further concludes that the record the appeal board reviewed contained far more than the minimum factual basis which the law prescribes for such judgment and valid classification of a registrant.

Finally, the Court is of the view that due and fair process was adhered to in all proceedings taken by the local and appeal boards in arriving at the 1-A classification.

The verdict of guilty as charged in the indictment which the Court announced in open court is, accordingly, reaffirmed.

GEORGE ROSLING
U. S. D. J.

FOOTNOTES:

[1]Defense counsel's motion to dismiss contended that "the findings by the Selective Service Board * * * and subsequently by the Appeals Board were findings that were not based upon facts before either of the Boards; that they are contrary to the weight of credible evidence," and that the decisions of both boards were made "without any facts being adduced by either Board to warrant their conclusion."

[2]Fed. R. Crim. P. 23(c) provides that "[i]n a case tried without a jury the court shall make a general finding and shall, in addition, on request, find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein."

[3]The defendant at the time of filing of this opinion has not yet been sentenced.

[4]The "Instructions" which preface the "Statements of the Registrant" in the Classification Questionnaire admonish the registrant that

> "You are required by law to fill out and return this questionnaire * * *.
>
> "After this questionnaire has been completed you are required to report to your local board in person or by mail with *10 days* after it occurs * * * any other new fact which may affect your classification." [Emphasis added.]

[5]Looking ahead to the "Resume of the Inquiry" dated June 26, 1967, which was conducted by the FBI and the "Recommendation" of the Department of Justice dated January 5, 1968, made to the Appeal Board of the Selective Service System as required by Section 6(j) of the Universal Military Training and Service Act (50 U. S. C. App. 456[j]), as then in force, in connection with Messinger's claim to be a conscientious objector (see, *supra*, p. 26, *et seq.*),we find the following data: Messinger had attended Adelphi College as a full-time student from September, 1962 until July, 1963 when he was dismissed due to poor grades. He had thereafter enrolled in State University of New York, Evening Division, Farmingdale, New York, which he attended from January to June, 1964, when he appears to have dropped out. In February, 1965, he resumed his education, this time at Nassau Community College, Garden City, New York, where he remained until June, 1967.

[8]Defendant's "poor grades" at college level were preceded by a high school record giving no great promise of scholastic excellence. He had, according to the FBI resume, attended Plainedge High School in Plainedge, New York, from 1959 until his graduation in June of 1962. There he had ranked 250th out of a class of 275, his standing being in the lowest 10% of his class.

[9]The original of defendant's letter is not part of the Selective Service file and was not produced at trial. He did not, however, contest the fairness of its summarization.

[10]Inasmuch as Messinger sought to establish and buttress the bona fides of his claim by reference to the tenets of a specific religious faith—he claimed to be a devout adherent of the Jewish faith, although the Rabbi of the synagogue he said he attended did not recall him—the teachings of the *Seeger* trilogy do not appear to enter significantly into our problem. Here we are not concerned with the *Seeger* enunciation of equivalence between a "sincere and meaningful" antiwar attitude and such attitude derived from an orthodox belief in God, for Messinger's self-proclaimed beliefs are, as he describes them, the orthodox and traditional beliefs of a practising Jew. Indeed, the *Seeger* dictum reaffirms the statutory bar to recognition as conscientious objectors of those who, while disavowing an orthodox religious underpinning for their objections, rest their claim to exemption on an organon which, true enough, is deeply rooted, but which is yet in summation a political, sociologic or economic rationale that war is wrong, wherefore they will have no part of it. This tangential aspect of the *Seeger* rubric is closely interwoven with the fabric of what we here consider. See, *United States v. Seeger*, 380 U. S. 163 at p. 173, 85 S. Ct. 850 at p. 858 (1965).

[11]In the same section concerning participation in organizations, he describes himself as born into the Jewish religion, and names and locates the congregation which he customarily attends and identifies its Rabbi. In response to a question calling for a careful description of "the creed or official statements of said religious sect or organization in relation to participation in war," he offers a number of brief quotations which are "statements found in Jewish Doctrines" in addition to his earlier citation of the Ten Commandments as relevant. The sources are Isaish, Rabbi Moshe Lieb of Sasm (Tales of Hasidim), (Martin) Buber, "Leveticus Rabbah, Tzar IX, 9," and "Numbers Rabbah, Hukkah, XIX, 27."

It is not the Court's function nor does it have the ability to supply the antithesis for each thesis defendant propounds. What the Court is here called upon to do is no more than to evaluate whether the rejection by the local and the appeal boards of the defendant's claim that the teachings of his religion constrained his conscience and their finding that he was insincere in his avowal rest upon no rational basis in fact. One reflecting on the six days' war and noting the territory beyond the narrow borders of Israel in which its battles were fought might well be persuaded that not all of defendant's coreligionists abroad have views that match his as to what the Jewish religion requires of them.

The Court does not in any sense assume to judge and declare what is and what is not the faith of a believing Jew. What it does say is that, with the views on war among Jews generally thus disparate and fragmented, the appeal board is not to be faulted for its failure to accept as apodictic in its conclusion the syllogism defendant tendered of which the major premise was: Believing Jews are constrained by their religion to a conscientious opposition to all war.

[10]The increment to the local board's file included a number of letters from defendant as well as from third parties whom he had solicited to write. These last stood in varied relationships to him. The letters purported to furnish information concerning Messinger's views and the circumstances in which he expressed them. They also gave the correspondent's assessment of the sincerity of his avowals of conscientious objection to participation in all war or to rendering military service. The correspondence which is too voluminous and discursive to permit of analysis, let alone repetition even in summary form in an opinion already overlong is to the limited extent that it is specific in the data it offers not unanimously favorable to Messinger. One might without exposing himself to a charge of bias against the defendant by an eclectic picking and chosing of that which prejudices him, find in these letters alone a rational basis in fact for a finding of insincerity on the registrant's part and of opportunism rather than motivation by high moral principles. A fortiori, if the grist adverse to defendant's claims which the Board might winnow from these letters were placed by it in the circumstantial and chronological frame of reference provided by defendant's Selective Service file, to be weighed under a rule of preponder-

ance of evidence, the Board's disbelief of defendant's sincerity would be the more reasonable conclusion to deduce from the record. (See, *supra*, pp. 19-24 for discussion.)

[11]See 50 App. §455; 32 C. F. R. 1623.4(d). That subdivision of the Regulations reads:

> "When the local board classifies or changes the classification of a registrant, it shall record such classification on the Classification Questionnaire (SSS Form No. 100), the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101)."

[12]*Sicurella v. United States*, 348 U. S. 385, at p. 392, 75 S. Ct. 403, 406 (1955), deals with action taken by an appeal board rather than by a local board. In it the Supreme Court reaffirms the principle of general application in the review of judicial and quasi-judicial determinations. Recognizing that the *Sicurella* appeal board had denied the registrant conscientious objector status in a circumstantial context in which *legitimate* grounds for its denial might be sifted from the record, the Supreme Court, nevertheless, declared that it could not rule out the possibility that the Board had relied on grounds that were *impermissible*. Hence, such uncertainty "must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground."

[13]32 C. F. R. §1624.2(b) places the onus upon the registrant at the hearing of supplying

> "such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

[14]At p. 326 of the stenographer's minutes of the trial Messinger's testimony on his direct examination in this connection was as follows: Responsive to the Court's declarative question,

"The summary says that your reply to that was, 'It was too much trouble,'" defendant replied, "No, I didn't. I explained to them * * * What I have just told you."

A few moments later, asked by his attorney whether he made such an answer to that question, the reply he gave was (smp. 328), "Not in those words, no."

The direct examination continues:

> "Q. What did you say? A. I explained to them what I explained before, and then I again tried to explain why my father was present and tried to have my father explain it and myself to explain why the reason for not signing that questionnaire when I was 18.
>
> Q. But you didn't say, 'It was too much trouble?' A. No."

The Court, a few pages further along in the record (smp. 332), is recorded as asking Messinger, "Did you use the word 'trouble' at all in any connection in answering questions as to why you didn't originally claim to be a CO?" Messinger answered, "Not to my recollection, no."

This he watered down (smp. 333) to a qualified admission.

> "I might have said something that it might have caused a lot of trouble if I did it at a time if,—so long as—so long as I didn't have to face it at that time, I might have said something like that, but not in the context they used it."

On his cross examination defendant continued to embellish the claim he had made on his direct examination that the secretary of the local board, a Miss Miller whose duty it was to minute the proceedings, appeared to be inattentive (smp. 392, 393). This prompted the Court to ask defendant whether he had

> "ever use[d] the word 'trouble' in any letter you wrote to the board, about the trouble of getting up a C.O. form?"

Messinger replied,

> "Not to my recollection."

Further inquiry in the course of which the letter of November 20, 1966, earlier introduced in evidence by the prosecution, was again brought to his attention with its use of the word trouble (see excerpt quoted in the text, *supra*, p.), elicited a

firm denial from defendant that he had used the word at the hearing and that its use ascribed to him was a misquotation.

The Court's finding is that he did in fact use the word "trouble" at the hearing and generally in the sense in which the Board interpreted it, that the secretary, Miss Miller, was not inattentive or neglectful of her duties and that the summary is an accurate condensation of what transpired.

[15]Pub. L. 90-40 §1(7) which in 1967 amended 50 App. §456(j) eliminated the requirement for a hearing by the Department of Justice (discussed in the text to which this footnote is appended), when an appeal from a local board decision denying objector status is taken. 32 C. F. R. 1626.25 formulating the statutory Department of Justice procedure specially applicable for processing conscientious objector appeals was, accordingly, rescinded.

[16]The Justice Department's letter transmitting the dossier to Mr. Toaz, dated August 3, 1967, contains the instruction: "Under no circumstances should names and addresses of informants be disclosed to the registrant."

[17]Mr. Toaz' "Statement of Facts" in his "Report of Hearing" is brief enough to bear quotation in full. It reads:

> "Prior to the hearing, I had received from the Registrant a letter commenting upon the Resume of Inquiry which had been forwarded to him with the Notice of Hearing. The letter dated August 18, 1967 is being returned with the file.
>
> "Registrant appeared at the hearing with his father who was much disturbed by Registrant's persistent maintenance of a conscientious objector's position.
>
> "At the hearing I discussed with the Registrant the contents of his letter of August 18th and also went over with him his relationship and association with those whose letters were attached to the original application for deferment on a Conscientious Objector's basis. In addition, I discussed with him his association with the S.D.S., the Jewish Peace Fellowship and his attitude towards his Jewish Faith. I also ascertained that Registrant is now a full time student and feels that on this basis he might again get a Student Deferment. However, he informed me that he would not make such application and felt that

now was the time for him to face the situation raised by his Conscientious Objector's position.

"In the course of the hearing I ascertained from the Registrant and his father that he was a Conscientious Objector ever since he attended Hebrew Grammar School. His failure to give up these views has broken up his engagement to his fiance who did not wish to be associated with him because of them. The Registrant's father substantiated the Registrant's statement that this was the basic reason for the breakup of the engagement.

"During the hearing the Registrant reiterated what often appears in the record that his veiws are based upon his belief in God and God's teachings against war and participation in it."

[18]The recommendation annotates as suspect the oft-encountered synchronization of imminent military service and the public profession of conscientious attitudes claimed to have been long, but secretly, held. Reference is made in this connection to *United States v. Taylor*, 351 F. 2d 228, 230 (6th Cir. 1965), "religious conversions of convenience;" and *United States v. Corliss*, 280 F. 2d 808, 815 (2d Cir. 1960), cert. denied 364 U. S. 884. See, also, *Campbell v. United States*, 221 F. 2d 454, 457 (4th Cir. 1955).

[19]In support of the proposition that a registrant whose opposition to war rests upon pacifism alone is not qualified by such opposition, to exemption from military service on statutory grounds in that it does not emanate from religious training and belief, and that it does not suffice for exemption that the registrant's philosophical and political convictions may be antiwar, the recommendation cites as pertinent *United States v. Kanter*, 133 F. 2d 703, 707 (2d Cir. 1943), and *Swaczyk v. United States*, 156 F. 2d 17, 20 (1st Cir. 1946), cert. denied 329 U. S. 726.

[20]It is to be noted that the ex post facto entry into "peace" organizations is cited by Mr. Toaz in a context suggesting that such recent and self-serving association evidenced a long-standing, sincerely held and publicized, antiwar attitude.

[21]See, *Gonzales v. United States*, 348 U. S. 407, 75 S. Ct. 409 (1955); *Simmons v. United States*, 348 U. S. 397, 75 S. Ct. 397 (1955); *United States v. Nugent*, 346 U. S. 1, 73 S. Ct. 991 (1953); *Keefer v. United States*, 313 F. 2d 773 (9th Cir. 1963).

[22]*Simmons v. United States, supra*, 348 U. S. at p. 403; *United States v. Nugent, supra*, 346 U. S. at p. 5; *White v. United States*, 215 F. 2d 782 (9th Cir. 1954), cert. denied 343 U. S. 970, 75 S. Ct. 528; *Kent v. United States*, 207 F. 2d 234 (9th Cir. 1953); *Imboden v. United States*, 194 F. 2d 508, 513 (6th Cir. 1952), cert. denied 343 U. S. 957, 72 S. Ct. 1052.

[23]See, *United States v. Jakobson*, 325 F. 2d 409 (2d Cir. 1963) at p. 417, affirmed 380 U. S. 163, 85 S. Ct. 850, citing *United States v. Balogh*, 157 F. 2d 939, 944 (2d Cir. 1946), judgment vacated on other grounds, 329 U. S. 692 (1947), and *United States ex rel. Reel v. Dadt*, 141 F. 2d 845 (2d Cir. 1944). The *Jakobson* opinion, in reversing the district court, said that it could "see no principle that would prevent our reversing for a new trial in which, if the Government chose, it could endeavor to prove from the mouths of members of the Appeal Board that they considered Jakobson to have been insincere."

U. S. Department of Justice Letter

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 24530

Jan 5 1968

Chairman, Appeal Board, Eastern
District of New York
Selective Service System
134 Jackson Street
Hempstead, New York 11550

Re: Irwin Ira Messinger
Conscientious Objector

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the captioned matter and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. John Clark Toaz, a Hearing Officer for the Department of Justice.

The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Inquiry, attached hereto and made a part hereof.

The registrant was born March 25, 1945, at Brooklyn, New York. He and his parents are of the Jewish religion. The registrant graduated from Plainedge High School, Plainedge, New York, in June 1962. He attended Adelphi College, Suffolk Division, Oakdale, New York from September, 1962 until July, 1963, State University of New York, Evening Division, Farmingrale, New York, from January until June of 1964, and Nassau Community College, Garden City, New York, from February, 1965 until June, 1967. On his SSS Form 100, filed February 6, 1964, the registrant did not claim conscientious objec-

tion. On his SSS Form 150, filed August 31, 1966, he claimed exemption from both combatant and non-combatant military training and service. He was classified in Class I-A, was retained in said classification after his personal appearance before the local board, and has appealed.

Attached hereto and made a part hereof is Exhibit A, submitted to the Department of Justice on behalf of the registrant.

The registrant appeared before a Hearing Officer at Huntington, New York, on August 29, 1967, accompanied by his father. The Hearing Officer noted that the registrant's father was "much disturbed by registrant's persistent maintenance of a conscientious objector's position." The Hearing Officer stated that he discussed with the registrant the contents of his Selective Service file, his associations with the Jewish Peace Fellowship and his attitude toward his Jewish faith. The Hearing Officer ascertained that the registrant was at the time of the hearing a full-time student and felt that on this basis he might again secure a student deferment but that he would not make such application inasmuch as he felt that the time had come for him to face the situation raised by his conscientious objector claim. The registrant and his father both stated that the registrant had been a conscientious objector ever since he attended Hebrew Grammar School and that his failure to abandon his views caused his fiance to terminate their engagement. The Hearing Officer noted that throughout the hearing "the registrant reiterated what often appears in the record that his views are based upon his belief in God and God's teachings against war and participation in it." He concluded that the registrant was sincere and made his claim in good faith and that he firmly believes he should not participate in war or military activities either directly or indirectly. He recommended, therefore, that the appeal

of the registrant, based upon grounds of conscientious objection, be sustained.

On his SSS Form 150 the registrant stated in response to Question No. 3 of Series II that he received his religious training and acquired the convictions which formed the basis of his claim "starting some ten years ago"; yet, he made no mention of such a claim a brief two and one-half years previously at the time of filing his SSS Form 100. As a matter of fact, no mention of conscientious objection was made until long after the registrant had been originally classified I-A, found acceptable for service, and ordered to report for induction. Religious convictions of the nature of conscientious objection to participation in war in any form arise from deep rooted and abiding beliefs held for a long period of time, and their assertion at a time when military service has become imminent for the registrant is not persuasive. *United States v. Taylor*, 351 F. 2d 228. Although at times sudden accessions of belief may indeed be sincere, they rarely synchronize so perfectly with external facts making them convenient. *United States v. Corliss*, 280 F. 2d 808, *cert. denied*, 364 U. S. 884.

Registrant's sincerity in putting forth his claim of conscientious objection on the basis of his alleged religious training and belief is questioned throughout the resume. On page 1 thereof mention is made of a letter, written by the registrant when he was seeking reinstatement in Adelphi College in August, 1963, wherein he commented that only at the time of writing said letter did he begin to realize that his life "would be ruined" if he had to go into the Army. On page 2 of the resume are expressed two separate opinions, both pertinent, one questioning whether the registrant understands the meaning of conscientious objection and appraising his personal beliefs as transitory in nature and the other noting that the registrant's convictions are not of long standing. The

resume, on page 3, contains evidence that the registrant is clearly opposed to the participation of the United States in the Vietnam conflict, but those aware of his stand in this regard had no inkling of a religious basis for his position. On pages 4 and 5 of the resume an acquaintance with whom the registrant had discussed his pacifism at length advises that the registrant's pacifism is not based on religious training but that the registrant is an honest and sincere individual who holds true pacifist beliefs.

Pacifism alone, however, does not qualify one for exemption from military service. In order to qualify for such exemption as a conscientious objector one must establish that his opposition to participation in war in any form stems from his religious training and belief. A registrant whose opposition to war does not emanate from religious tenents or beliefs is not entitled to exemption from service even though his philosophical and political convictions may be anti-war. *United States v. Kauten*, 133 F. 2d 703. The burden is upon the registrant claiming exemption to bring himself within the excepted class. *Swaczyk v. United States*, 156 F. 2d 17, *cert. denied*, 329 U. S. 726. The board is not bound to give credence to the registrant's statements as to his beliefs where, as here, conscientious objection seems not to have been thought of until military service became inevitable. *Campbell v. United States*, 221 F. 2d 454.

With due regard for the recommendation of the Hearing Officer, the Department of Justice concludes that the registrant is not sincere in his claim of conscientious objection; accordingly, it is recommended to your Board that the registrant be not classified in Class I-O or in Class I-A-O.

The Selective Service Cover Sheet in the above class is returned herewith.

Sincerely,

/s/ T. OSCAR SMITH
Chief, Conscientious-Objector Section

Report of Hearing Officer

REPORT OF HEARING CONDUCTED BY THE DEPARTMENT OF JUSTICE PURSUANT TO SECTION 6(J) OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

In re: Irwin Ira Messinger Conscientious Objector
SSN 30-3-45-731

DATE OF GIVING NOTICE OF HEARING:

I hereby state that on August 14, 1967, one copy each of the Resumé and Instructions to Registrants was sent to Registrant with Notice of Hearing copy of which is attached.

HEARING HELD PURSUANT TO NOTICE:

At 381 New York Avenue, Huntington, New York, on August 29, 1967.

Registrant personally appeared at the hearing in response to the notice mailed to him, and was accompanied by his father.

NATURE OF CLAIM FOR EXEMPTION:

Registrant claims exemption from both combatant and noncombatant military services.

STATEMENT OF FACTS:

Prior to the hearing, I had received from the Registrant a letter commenting upon the Resumé of Inquiry which had been forwarded to him with the Notice of Hearing. The letter dated August 18, 1967 is being returned with the file.

Registrant appeared at the hearing with his father who was much disturbed by Registrant's persistent maintenance of a conscientious objector's position.

At the hearing I discussed with the Registrant the contents of his letter of August 18th and also went over

with him his relationship and association with those whose letters were attached to the original application for deferment on a Conscientious Objector's basis. In addition, I discussed with him his association with the S.D.S., the Jewish Peace Fellowship and his attitude towards his Jewish Faith. I also ascertained that Registrant is now a full time student and feels that on this basis he might again get a Student Deferment. However, he informed me that he would not make such application and felt that now was the time for him to face the situation raised by his Conscientious Objector's position.

In the course of the hearing I ascertained from the Registrant and his father that he was a Conscientious Objector ever since he attended Hebrew Grammer School. His failure to give up these views has broken up his engagement to his fiancee who did not wish to be associated with him because of them. The Registrant's father substantiated the Registrant's statement that this was the basic reason for the break-up of the engagement.

During the hearing the Registrant reiterated what often appears in the record that his views are based upon his belief in God and God's teachings against war and participation in it.

CONCLUSIONS:

I conclude that the Registrant is sincere and makes his claim in good faith, and firmly believes that he should not participate in war or military activities either directly or indirectly.

RECOMMENDATIONS:

I recommend that the appeal of the Registrant based upon grounds of conscientious objection be sustained.

Hearing Officer

Dated, September 6, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 516

IRWIN IRA MESSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 29, 1969, and, on August 25,

1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process by virtue of the procedures followed by the Department of Justice in reviewing his conscientious objector claim and the contents and form of its recommendation to the appeal board that the claim be denied.

2. Whether petitioner was denied a fair trial by the conduct of the judge at his jury-waived trial.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner was convicted of wilfully and knowingly failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. (Supp. IV) 462. On February 3, 1969, he was sentenced to imprisonment for a period of three years.

Petitioner registered with the Selective Service System in 1963.[1] On February 4, 1964, petitioner completed a classification questionnaire sent to him by his local board. He did not sign Series VIII of the questionnaire entitled "Conscientious Objector", and did not claim any exemption as a conscientious objector. On February 19, 1964, he was classified I-A by his local board. (R. 36-38)

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[1] The relevant facts are set forth in greater detail in the opinion of the district court (See Pet. App. 12a-46a) and are summarized in th opinion of the court of appeals (See Pet. App. 1a-7a).

In January, 1965, petitioner responded to a current information questionnaire by indicating that he was no longer in attendance at college but would be a part time student starting in February 1965, at a community college, but made no statement pertaining to conscientious objection. On April 21, 1965, he was classified 2-S, the student deferment classification (R. 38).

After failing to return a current information questionnaire sent him in November, 1965, petitioner was classified I-A and ordered to report for a physical examination (R. 39-40). Petitioner then wrote to his local board appealing his I-A classification on the ground that he had changed his status from that of full time to part-time student because he had to work to pay for his education and that he intended to become a full-time student in February, 1966. The letter contained no indication that he considered himself a conscientious objector. (R. 42-44)

At the end of December 1965, petitioner completed another current information questionnaire in which he made no mention of conscientious objection. In pressing his claim for a student deferment he stated "I very much want to finish my schooling before going into the service." (R. 441)

On January 25, 1966, the Appeal Board unanimously affirmed petitioner's I-A classification (R. 46). On February 9, 1966, petitioner informed his local board that he was a full time night student at a community college. The following week petitioner was mailed an order to report for induction on March 2, 1966. The local board, however, rescinded

that order *sua sponte* and reclassified petitioner I-S (c), a classification which permits a registrant to finish the school term before his call up for military service (R. 50-52).

In May 1966, petitioner completed a third current information questionnaire in which he again failed to mention any claim to conscientious objector status. He was reclassified I-A in June and wrote to request a personal appearance on the ground that he would be a full time student in the fall. After petitioner had appeared personally before the local board, it affirmed his I-A classification. On August 16, 1966, the appeal board upheld the local board's classification. The classification was appealed to the national selective service appeal board which affirmed the local board's action on October 13, 1966 (R. 53-73).

In August 1966, after the appeal board had acted, but prior to the decision of the national selective service appeal board, petitioner wrote to his local board requesting a conscientious objector form. He stated in his letter:

> I would like to request a conscientious objector form due to the fact that I will not be getting my student deferment. I felt it would be no need to express my beliefs regarding this matter of fighting and war if I had my student deferment. That is the reason I had never requested this status before, but now it is necessary for me to do so (R. 425).

Petitioner was sent such a form which he completed and returned to his local board. In this form petitioner stated that he was opposed to war in any

form because of his religious training and belief; that he claimed exemption from both combatant and noncombatant training; that his view derived from his Jewish background; and that he had acquired his conscientious objection convictions "some ten years ago" (Pet. App. 5a).

On November 15, 1966, after reviewing the completed form, the local board unanimously determined that the information submitted in the form did not warrant a change in his classification (R. 77-79). On November 22, 1966, the local board received a letter from petitioner in which he requested a personal appearance and stated in pertinent part:

> * * * I was a conscientious objector to war and killing since I can remember but had not gone through the trouble of filing Form SS 150 before because I thought I would have my student deferment (R. 80).

After petitioner's appearance on January 10, 1967, the local board affirmed his I-A classification and petitioner appealed to his appeal board.

In January, 1967, under procedures then in effect (50 U.S.C. App. 456(j)),[2] the appeal board tentatively determined to reject petitioner's claim to conscientious objection, 1-O status. His file was then sent to the Justice Department for its advisory recommendation. Prior to a hearing, the

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[2] In 1967, the Act was amended to eliminate Department of Justice participation in the consideration of conscientious objector claims in the administrative appeal process. See Act of June 30, 1967, 81 Stat. 100, 104, 50 U.S.C. App. (Supp. IV) 456(j).

F.B.I. conducted an inquiry and a resume of the F.B.I. report was given to petitioner and the report was given to the hearing examiner (R. 88-94). This report contained, *inter alia*, a summary of a letter written by petitioner to Adelphi College on August 25, 1963, which stated "only at the time of writing of this letter did the registrant begin to realize that his life would be ruined if he had to go into the Army." (Pet. App. 21a, 49a). Petitioner sent the hearing officer a letter to refute some of the points in the resume (Pet. App. 6a).

After holding the hearing on August 29, 1967, the hearing officer wrote a two-page report in which he found petitioner to be sincere and recommended that he be reclassified as a conscientious objector (Pet. App. 51a-52a). However, in making the recommendation of the Department of Justice to the appeal board, the chief of the Department's conscientious objector section rejected the hearing examiner's conclusion that petitioner was sincere. The Department's letter to the appeal board emphasized petitioner's long delay in asserting his conscientious objector claim despite petitioner's own statement that his views had originated some ten years before; that petitioner's sincerity was questioned throughout the F.B.I. resume of inquiry; that despite petitioner's claims to the contrary his beliefs were politically rather than religiously motivated. The Department of Justice therefore recommended that petitioner not be reclassified in I-O or in I-A-O (Pet. App. 47a-50a). The resume of the F.B.I. report was sent to the appeal board. Neither a copy of the complete F.B.I.

report nor the hearing examiner's report were sent to the appeal board. Petitioner wrote a letter to his appeal board in support of his claim to conscientious objector status after receiving a copy of the Department of Justice recommendation. The apeal board reaffirmed petitioner's classification as I-A (R. 110, 241).

Petitioner was ordered to report for induction on March 20, 1968, by his local board. He reported to the induction center but refused to submit to induction.

ARGUMENT

Each of the allegations of error presently raised in the petition was fully canvassed and rejected by the court of appeals (Pet. App. 2a-11a).

1. Petitioner's principal contentions are that the procedures followed by the Department of Justice in this case in reviewing his conscientious objection claim and submitting its conclusions to the appeal board constituted a denial of due process (See Pet. 8-12). As the court of appeals pointed out, however, the Department of Justice was not barred from reversing its hearing officer (see *Gonzales* v. *United States*, 364 U.S. 59, 63) and the information contained in both petitioner's file and the F.B.I. report supplied ample justification for the Department's finding that petitioner was insincere.

The alleged legal error in the body of the Department of Justice's recommendation, regarding the religious basis necessary to support a conscientious objection claim (see Pet. 10-11), was as the court of appeals held in no way prejudicial. The Department's

recommendation was not based on a finding that petitioner failed to satisfy the legal criteria for conscientious objector status, but rather constituted a finding that petitioner was insincere in his beliefs. Moreover, two of the appeal board's members testified at trial that they rejected petitioner's conscientious objector's claim because they believed him to be insincere.

Nor did the fact that the appeal board did not have a copy of the hearing examiner's report prejudice petitioner. The report was accurately summarized in the Department's recommendation (Pet. App. 48a-49a).[3]

We note further that, by statutory amendment, the Department no longer participates in reviewing conscientious objector claims and therefore contentions of error in its procedures do not raise issues which will have continuing or recurring significance.

2. Petitioner's final contention—that he was denied due process of law by the manner in which the trial court conducted his jury-waived trial—essentially rests on the argument that the trial judge cross-examined him in some detail. However, an examination of both the record and the lengthy opinion and findings of fact by the district judge (Pet. App. 12a-46a) discloses that the active role of the judge

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[3] The views expressed by the court of appeals in this case concerning the procedures followed by the Department of Justice in reviewing conscientious objector claims are in accord with the views recently expressed by the Fourth Circuit in *Pritchard* v. *United States*, No. 12,974, decided June 23, 1969, petition for a writ of certiorari pending No. 636 Misc., this Term.

at the trial was properly designed fully to develop the facts in this non-jury case. Cf. *Stuckey* v. *Andrews*, 249 F. 2d 828, 830 (C.A. 5); *La Barge Water Well Supply Co.* v. *United States*, 325 F. 2d 798, 801-802 (C.A. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

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